STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

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April 17, 1996

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Cable Home Wiring (MM Docket No. 92-260) and Telecommunications Inside Wiring -- Customer Premises Equipment (CS Docket No. 95-184)

Dear Secretary Caton:

Enclosed are an original and 11 copies of the reply comments of the New York State Department of Public Service in the above-referenced proceeding.

Respectfully submitted,

John L. Grow /tac

John L. Grow
Special Counsel - Cable

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Enclosures

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APR 7 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-260
Cable Home Wiring	)	
and	)	
In the Matter of	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
Customer Premises Equipment	)	

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REPLY COMMENTS OF THE NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

Introduction and Summary

The New York State Department of Public Service ("NYSDPS") submits these comments in reply to comments filed in each of the above-referenced proceedings regarding telephone and cable inside wiring rules and policies. NYSDPS has consolidated its reply comments in recognition of the current demands on the Federal Communications Commission's ("Commission") resources and certain common issues in these proceedings relative to the provision of video programming to tenants in multiple dwelling units ("MDUs").

The NYSDPS reply comments cover three areas. First, we endorse the comments that support the establishment of parity between telephone and cable inside wiring rules, and recommend that customers determine the demarcation location where

practicable. Second, we support the comments that suggest that the Commission allow the states to retain their authority over the maintenance of simple telephone inside wire and that recognize the importance of state/federal cooperation during the transition to a broadband joint video/telephony environment. Finally, in response to the various comments on inside wire regulations for MDUs, the NYSDPS agrees with those comments that oppose the inclusion of common loop-through inside wiring in an MDU within the cable home wiring rules, disagrees with those comments that would have the Commission preempt state right of access statutes and supports efforts by the Commission to prohibit all multichannel video programming distributors from entering into exclusive anti-competitive agreements with the owners of MDU's.

I. Parity

The Commission received comments on whether it should establish parity for all wireline communications networks, regardless of whether they provide cable or telephony services or both.

Two fundamental issues defining parity are: comparable opportunity for consumer ownership of inside wire and common demarcation guidelines. In general, we support both of these concepts as they maximize consumer options and level the competitive playing field.

With respect to consumer ownership of cable inside wire, the NYSDPS favors New Jersey's[1] initial approach which would permit, but not require, existing subscribers to own inside wiring. We agree that any mandatory transfer of ownership may confuse and inconvenience subscribers. For example, a subscriber may be frustrated to learn that there is no simple method to test the inside wire for troubles. In contrast with telephone inside wire the telephone is portable and the standard jack arrangements create a modular system that is easily tested.

In addition, any transfer of ownership implicates the Commission's rate regulations, particularly, the terms and conditions applicable to the maintenance of the wiring by the cable operator. Under existing rules, if the operator owns the home wiring, the rates chargeable to subscribers for maintenance and repair are subject to regulation based on the company's costs and a reasonable profit. Where the subscriber owns the wiring, the operator's obligation to provide service and terms thereof and the subscriber's rights are less clear. Given the lack of a developed, competitive market for the installation and maintenance of cable home wiring, it is important that the Commission clarify the maintenance responsibilities of the cable operator and the rights of subscribers. We also believe that the Commission should consider and clarify the impact of the rate

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[1] Comments of the State of New Jersey Board of Public Utilities, CS Docket No. 95-184, pg. 15.

deregulation provisions of the Telecommunications Act of 1996 ("Telcom Act of 1996") on cable home wiring issues.

At this juncture there is no overall compelling need to change the current cable arrangements except to ensure that customers have an option to own their wiring with known consequences and may freely use the wiring, where suitable, to receive services from other providers. Offering the customer these options, regardless of the technology, establishes parity at the appropriate level. Details on other aspects of cable inside wire ownership may vary due to technology or historical development, but, as technology converges, the guidelines for inside wire should evolve to the model used for telephony in order to maximize consumer options and establish parity.

The NYSDPS agrees with the comments of the California and New Jersey State Commissions that may be merit in coterminous demarcation points. However, we believe that customers should have the option of choosing the demarcation point for cable and telephony wire, to the extent technically feasible.

II. Dual Regulation

The Commission seeks comments on whether it may be necessary to harmonize cable and telephone regulation as the technologies necessary to provide each service converge. We agree with California's comments that a harmonious federal/state regulatory structure is the optimum model for providing a level playing field as competition develops in the cable and telephone

industries;[2] however, there are no policy reasons for changing substantially the existing framework for the dual regulation of cable or telephony at this time. Until competition develops in the market for cable home wiring, franchising authorities should continue to play an important role in administering Commission rate regulation concerning equipment, technical standards and safety standards concerning signal leakage and generally in ensuring that subscribers are informed of their options concerning wiring. There is also no reason to alter the existing framework for the regulation of simple telephone inside wire. In New York, light regulation of telephone inside wire serves as a protection for the most vulnerable customers.

As the California Commission stated in its initial comments:

> ". . .notwithstanding the technological advances enabling telephone and cable services to be carried over the same wire, the dual regulatory system mandated by Congress should remain intact. There are ways of accommodating changes in technology without contravening Congressional intent that there should be a dual system of regulation for wire communications."

Moreover, as a matter of law, there is no reason that the dual jurisdictional framework must necessarily change as the technologies used to deliver cable television and telephone services converge. It is New York's view that Congress continues

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[2] Comments of the People of the State of California and the Public Utilities Commission of the State of California on the Notice of Proposed Rulemaking, CC Docket No. 95-184.

to reaffirm the 1934 Act's division of state and federal authority even as advances in technology make possible the provision of video and telephony over the same facilities.

Furthermore, the Commission may not in this rulemaking conclude that continued state regulation of telephone inside wiring should be preempted because of "conflicts" that may arise in the future. (NPRM, ¶ 56) The court, in California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990), made clear that it is not enough to justify a preemption order on the grounds that state regulation would frustrate legitimate Commission goals, but rather that absent preemption state action would negate federal policy. In this instance, the Commission is asking parties to speculate on what could possibly occur in the future, and according to the California Court the Commission would bear the burden of justifying any preemption order by demonstrating that it is narrowly tailored to preempt only such State regulations as would negate those goals. (California at 1243)

Therefore, until there is widespread use of broadband technology to provide both video and telephony there is no legal basis for the Commission to conclude that continuing state regulation over telephone inside wire, under Section 152(b) of the Communications Act, will negate federal policy. In the event that broadband technology becomes widely used to provide telephony and cable, there would still no basis for preemption. This result is consistent with the Telcom Act of 1996 where Congress did not see fit to alter the jurisdictional demarcation

between intrastate and interstate services, except to a very limited extent, even though it knew full well that broadband technology could be used for video and telephone. New York's continuing light regulation of telephone wiring in no way stands as an obstacle to the fulfillment of legitimate federal goals. If anything, state regulation serves to ensure that competitors are able to fairly compete and that consumers are adequately informed and protected during this transition period.

III. Multiple Dwelling Units

In Docket No. 92-260, the Commission seeks comment on a proposal "to allow a building owner to purchase loop-through wiring in the limited situation where all subscribers in a multiple dwelling unit building want to switch to a new service provider." (FNPRM, ¶ 40) In order to reach this result it would be necessary for the Commission to determine that all distribution facilities in a building constitute subscriber home wiring pursuant to § 624(i). NYSDPS agrees with those commenters, e.g., Time Warner Cable, that oppose the inclusion of common loop-through MDU inside wiring within the home wiring rules, even under the limited circumstances described.

Commenters in favor of the proposal claim, in the interests of competition, that a landlord's ownership of all inside wiring is necessary to promote subscriber choice. The Commission has expressed its concern that "allowing the multiple dwelling unit building owner to control the wiring. . .could arguably supersede subsequent subscribers' wishes." (Id.) We

agree with the Commission. First, it is unclear how such multiple, coincidental decisions could be verified. Second, the frequent changes in the tenant population, much less changes in the preferences of individual tenants over time would make it virtually impossible to ensure that the alleged purpose of the proposal was being fulfilled.

In addition, the same commenters do not explain how public policy initiatives favoring the competitive delivery of telecommunications services will be served by divesting the cable operator of the internal broadband distribution facilities and the tenants of drop cable in these circumstances. For these reasons, we oppose any rule that would define cable home wiring to include loop-through wiring as if a landlord rather than each individual tenant was a subscriber to cable service.

In Docket No. 95-184, at paragraphs 61-64 of the NPRM, the Commission requested comment on a variety of issues relative to access by cable operators and telecommunications providers to private property, particularly, MDUs. At least one commenter, Liberty Cable, has chosen to respond by urging the Commission to preempt state right-of-access statutes for cable operators. We strongly disagree.

New York statute includes a right-of-access provision for cable television systems. (Public Service Law, Section 228; formerly Executive Law, Section 828) In reviewing the New York statute, the U.S. Supreme Court observed that it was enacted by the New York State legislature "to facilitate tenant access to

CATV." (Loretto v. Teleprompter, 458 U.S. 419, 423 (1982)) Similar statutes have been enacted in approximately one dozen other states.[3] They were known to Congress when it enacted the Cable Communications Policy Act of 1984 and were not then preempted. Nor, in two major amendments to the Communications Act since 1984, including the Telcom Act of 1996 (which was enacted after the FNPRM in this proceeding was released) has Congress acted to limit the effect of state right-of-access statutes in any way.

The Commission should also reject proposals to preempt state right-of-access statutes for a number of reasons. First, as a general matter, Section 637 of the Communications Act provides that a state law that is not inconsistent with Title VI is not preempted by the Act. Title VI of the Communications Act envisions dual state and federal regulation of cable television and state access statutes are fully consistent with the purposes of Title VI as set forth in Section 601. Second, they are not anti-competitive, particularly, in New York state, where franchises are non-exclusive. The cable operator obtains no exclusive right to provide cable service within any MDU and the building owner is free to contract with others to provide an

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[3] In at least one case, a state right-of-access statute has been held not to violate the first amendment claims of a non-franchised multi-channel video programming distributor. (Amsat Cable Ltd. v. Cablevision of Connecticut Limited Partnership, 6 F.3d 867 (2d Cir. 1993))

alternative source of multichannel video programming.[4] Third, the Telcom Act of 1996 reveals a preference for facilities based competition for video and telecommunications. (See, e.g., new Sections 653 and 271(c)(1)(A)) The existence of right-of-access rights for cable operators (and telephone companies) is likely to be an important factor that furthers, rather than impedes, such competition.

We also take this opportunity to express our agreement with the Commission that equal access to the subscriber's home wiring at the demarcation point would result in the ideal competitive model and promote the maximum choice for each individual subscriber. This should be the goal. We, therefore, support policy initiatives by the Commission to promote opportunities for the competitive delivery and availability of alternative sources of video and telecommunications services provided that such initiatives are designed to achieve competition for subscribers, not buildings, and meaningful choice for individual tenants, not building owners. One such initiative that only the Commission can take is to prohibit all multichannel video programming distributors from entering into exclusive agreements with MDU building owners.[5] Such agreements have been

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[4] In Docket No. 95-184, the Commission has stated that "state and local governments are indispensable to the regulation of cable television and telephone service." (NPRM, ¶ 57)

[5] At note 81 of the FNPRM in Docket No. 92-260, the Commission invites comment on a proposal of Bell Atlantic that would prohibit exclusive agreements between cable operators and owners of MDUs. That such agreements are inherently anti-competitive is obvious.

an impediment to competition in video programming in MDUs and may well have a similar effect with respect to telecommunications in the future.

Conclusion

The technologies used to transport telephony and cable services are merging and both services will be offered to an increasing number of subscribers over the same wire. We do not believe that any fundamental change in the dual regulatory approaches for cable and telephony are required at this time but we do endorse efforts by the Commission to establish flexible guidelines designed to create parity and maximize consumer options for all inside wire. One important means of optimizing consumer choice is to ban anti-competitive contracts between all multichannel video providers and MDU building owners that prevent tenants from exercising their right to choose a service provider. State right-of-access statutes are consistent with this objective

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That the Commission should not ignore the existence of similar agreements between building owners and any multichannel video programming distributor is equally clear.

and should not be preempted. Finally, there is no basis in law for the Commission to preempt state regulation of telephone inside wire.

Respectfully submitted,

Maureen O Helmer/rad

Maureen O. Helmer
General Counsel
New York State Department
of Public Service
Three Empire State Plaza
Albany, NY 12223
(518) 474-2510

Penny B. Rubin
John L. Grow
Of Counsel
Dated: April 16,1996
Albany, New York

Cable Home Wiring (MM Docket No. 92-260)
Telecommunications Inside Wiring (CS Docket No. 95-184)

CERTIFICATE OF SERVICE

I hereby certify that an original plus eleven copies with two "Extra Public" copies of the above-captioned proceedings were filed with William F. Caton, Acting Secretary, Federal Communications Commission, and by first class United States mail, postage prepaid, to all parties on the attached service list.

Penny Rubin /KAD

PENNY RUBIN
Managing Attorney
Office of General Counsel
New York State Department
of Public Service
Albany, NY 12223
(518) 474-1585

Dated: April 17, 1996
Albany, NY

Charles F. Larken
Vermont Department of
Public Service
120 State St.
Montpelier, VT 05602

Veronica A. Smith
Deputy Chief Counsel
Pennsylvania Public
Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Joel B. Shifman
Maine Public Utility Commission
State House Station 18
Augusta, ME 04865

Walter S. de la Cruz
Director, Cable Television Franchises
and Policy
NYC Department of Energy
and Telecommunications
11 Metrotech Center, Third Floor
Brooklyn, NY 11201

James Lanni
Rhode Island Division of
Public Utilities
100 Orange St.
Providence, RI 02903

Keikki Leesment
New Jersey Board of
Public Utilities
2 Gateway Center
Newark, NJ 07102

Telecommunications Report
1333 H St., NW - 11th Floor
West Tower
Washington, DC 20005

Rita Bermen
Vermont Public Service Board
89 Main St.
Montpelier, VT 05602

Mary J. Sisak
District of Columbia
Public Service Commission
Suite 800
450 Fifth St.
Washington, DC 20001

Ronald Choura
Michigan Public Service
6545 Mercantile Way
Lansing, MI 48910

Sam Loudenslager
Arkansas Public Service
Commission
1200 St.
P.O. Box C-400
Little Rock, AR 72203

Edward Morrison
Oregon Public Utilities
Commission
Labor and Industries Bldg.
Room 330
Salem, OR 97310

Gordon L. Persinger
Missouri Public Service
Commission
P.O. Box 360
Jefferson City, MO 65102

Ellen Levine
Public Utilities Commission
of the State of California
505 Van Ness Ave
San Francisco, CA 94102

Mary Street
Iowa Utilities Board
Lucas Building
5th Floor
Des Moines, IA 50316

Marsha H. Smith
Idaho Public Utilities
Commission
Statehouse
Boise, ID 83720

Gary Evenson
Wisconsin Public Service
Commission
P.O. Box 7854
Madison, WI 53707

Jane P. Olsen
Senior Assistant
General Counsel
Oklahoma Corp. Commission
400 Jim Thorpe Building
Oklahoma City, OK 73105

Judith St. Ledger-Roty
Pierson, Ball & Dowd
1200 18th St., NW
Washington, DC 20036

International Transcription
Services, Inc.
2100 M St., NW
Suite 140
Washington, DC 20037

Camille Stonehill
State Telephone Regulation Report
1101 King St., Suite 444
Alexandria, VA 22314

Sany Ibaugh
Indian Utility Regulatory Commission
901 State Office Bldg.
Indianapolis, IN 46204

Richard Metzger
Common Carrier Bureau
Federal Communications Commission
1919 M St., NW
Washington, DC 20554

Archie R. Hickerson
Tennessee Public Service Commission
460 James Robertson Pkwy.
Nashville, TN 37219

William Caton
Acting Secretary
Federal Communications Commission
1919 M St., NW
Washington, DC 20554

Alabama Public Service Commission
1 Court Square - Suite 117
Montgomery, AL 36104

Brad Ramsey
NARUC
Interstate Commerce Commission Bldg., Room 1102
12th & Constitution St., NW
Washington, DC 20044

Greg Krasovsky
Associate General Counsel
Florida Public Service Commission
101 East Gaines St.
Tallahassee, FL 32301

Kath Thomas
Washington U&TC
1300 S. Evergreen Park Dr., SW
P.O. Box 47250
Olympia, WA 98504-7250

Chad Russell
New Jersey BPU
Two Gateway Center
Newark, NJ 01702

James A. Nappi, Secretary
State of New Jersey
Board of Public Utilities
Two Gateway Center
Newark, N.J. 07102

Arthur Harding, Esq.
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C.

Daniel L. Brenner, Counsel
NCTA
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036

Paul Glist, Esq.
Cole, Raywid & Braverman
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Andrew D. Lipman, Esq.
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116

William J. Balcerski, Esq.
NYNEX Telephone Companies
1111 Westchester Avenue
White Plains, N.Y. 10604

Henry M. Rivera, Esq.
Ginsburg, Feldman and Bress, Chartered
Suite 800
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

W. James MacNaughton, Esq.
90 Woodbridge Center Drive
Suite 610
Woodbridge, N.J. 07095

Michael H. Hammer, Esq.
Wilkie, Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Walter S. de la Cruz, Director,
Cable Television Franchises and Policy
New York City Department of Information
Technology and Telecommunications
11 Metrotech Center
Third Floor
Brooklyn, New York 11201

Michael J. Karson
Attorney for Ameritech
Room 4H88
2000 West Ameritech Center Drive
Hoffman Estates, Illinois 60196-1025

Gary Phillips
Attorney for Ameritech
Room 1020
1401 H. Street, N.W.
Washington, D.C. 20005

Gary S. Lutzker, Telecommunications Counsel
N.Y.C. Dept of Information Technology
and Telecommunications
11 Metrotech Center
Third Floor
Brooklyn, New York 11201